

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

3 IN THE MATTER OF, Case No. 13-53846  
Detroit, Michigan  
4 CITY OF DETROIT, MICHIGAN February 19, 2014  
\_\_\_\_\_/ 10:03 a.m.

IN RE: MOTION OF DEBTOR FOR ENTRY OF AN ORDER VACATING THE  
APPOINTMENT OF OFFICIAL COMMITTEE OF UNSECURED CREDITORS  
(DOCKET #2626)

BEFORE THE HONORABLE STEVEN W. RHODES  
TRANSCRIPT ORDERED BY: ROBIN WYSOCKI

APPEARANCES:

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1 (Court in Session)

2 THE CLERK: Case number 13-53846, City of Detroit,  
3 Michigan.

4 THE COURT: Okay. So at this point I want to hear  
5 the motion regarding the creditors' committee.

6 MR. ELLMAN: Good morning, Your Honor. Jeffrey  
7 Ellman from Jones, Day on behalf of the city.

8 THE COURT: Other appearances, please.

9 MS. GIANNIRAKIS: Good morning, Your Honor. Maria  
10 Giannirakis on behalf of Dan McDermott, the United States  
11 Trustee.

12 MR. COWLEY: Good morning, Your Honor. Sean Cowley  
13 on behalf of the United States Trustee.

14 MR. MILLER: Good morning, Your Honor. Brett Miller  
15 proposed counsel to the Official Committee of Unsecured  
16 Creditors.

17 MR. SHAPIRO: Good morning, proposed co-counsel for  
18 the Unsecured Creditors' Committee.

19 MR. ROSENBLAT: Good morning, Your Honor. Heath  
20 Rosenblat of Drinker, Biddle, and Reath on behalf of  
21 Wilmington Trust National Association.

22 MR. ELLMAN: Thank you, Your Honor. We -- we did  
23 file our motion to vacate the appointment of the Official  
24 Committee of Unsecured Creditors. We filed that motion back  
25 in January and we have the two objections I'm sure Your  
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1 Honor's aware of from the U.S. Trustee and by the committee  
2 itself.

3 And just yesterday hopefully the Court had a chance to  
4 see that we filed a reply that I think somewhat  
5 comprehensively addressed the issues as we saw them.

6 THE COURT: I read it.

7 MR. ELLMAN: Yeah. So what I thought I would do is  
8 provide an overview then I can provide some more details of  
9 some on the major points if the Court would like that, or I  
10 would defer to what the Court would prefer to make this  
11 efficient.

12 We are now in the eighth month of this case. We have  
13 completed our long eligibility trial and a number of the  
14 litigation matters of importance. And there are obviously as  
15 you see a courtroom full of people, there's a lot of other  
16 stuff still going on.

17 But we have been involved in I would say seemingly  
18 non-stop restructuring discussions with representatives of all  
19 the major stake holders in this case. A lot of that through  
20 the Court ordered mediation process in an effort to resolve or  
21 narrow the issues. And I think that we've been making  
22 progress.

23 The goal is to complete this restructuring in the warmer  
24 months of this year so while it's still cold outside now, it's  
25 not that far away that it will be warm and we will be

1 hopefully completing this case.

2 THE COURT: Can I hold you to that?

3 MR. ELLMAN: Excuse me, Your Honor?

4 THE COURT: Can I hold you to that?

5 MR. ELLMAN: Well, we certainly hope that's the  
6 case. And you have a large role in that, Your Honor, so  
7 hopefully we'll -- we'll make that.

8 And we are on the cusp now as the Court is well aware,  
9 given the Court's deadline and our efforts that we purported  
10 to file our plan which we hope will be filed this week. So  
11 all of this is the product of a great deal of effort by the  
12 city and it's advisors that you might appreciate, of course  
13 working with all the representatives of the parties and all  
14 the mediators. And taking into account the things that the  
15 Court has told us or -- or ordered us, or helped us achieve.

16 And in that context we have a committee appointment at  
17 this juncture. And they're just getting up and running to  
18 start participating in the case. And this appointment by the  
19 U.S. Trustee at the end of 2013 was accomplished as we  
20 understand it, not because of some identified need or -- or  
21 lacking in the representation of creditors, but because in the  
22 U.S. Trustee's view the statute requires them to do this at  
23 this point in the case.

24 And that's Section 1102(a)(1) which they felt bound by

25 that statute. We had several, I think, cordial conversations  
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1 with the U.S. Trustee's office in advance of and after the  
2 appointment, that they felt fairly bound by that provision.

3       The city of course does not believe that the appointment  
4 is required by that section. It's a Chapter 11 concept in our  
5 view and the statute if you look at 1102(a)(1), a lot of what  
6 we're arguing about is really going into the -- the Code and  
7 reading it carefully.

8       It does say that after an order for relief in a Chapter  
9 11 case. And it's not a Chapter 11 case, so our view is that  
10 requirement is specifically tied to the Chapter 11 process and  
11 at best the U.S. Trustee has discretionary authority to put in  
12 place a committee and they haven't framed this as a need or a  
13 requirement that they see to -- to assist in representation of  
14 creditors, simply a statutory obligation. And we don't think  
15 there is a basis, on a discretionary basis to appoint a  
16 committee.

17       The other big issue -- and we can talk about all that  
18 more if Your Honor would like about the interpretation of  
19 1102(a)(2) after this introduction.

20       As far as the power to vacate this appointment, it's --  
21 sort of both objecting parties say that there's no power of  
22 the Court in this regard whatsoever. In our view there's  
23 nothing in the Bankruptcy Code that says the Court can vacate  
24 or cannot vacate. It's not addressed in any manner.

1 sort of -- kind of touch on the issues related to it, but they  
2 don't touch on this issue. And we believe, and we've cited  
3 cases, that it's necessary and appropriate for the Court to  
4 have oversight over these kinds of decisions of the U.S.  
5 Trustee's office and especially what we consider in our view  
6 the discretionary determination. And -- and we can again talk  
7 about that.

8 There's -- there's at least one case that has followed  
9 this. You're -- you're running on a fairly blank slate  
10 because there isn't much else except for this one case,  
11 Pacific Avenue out of North Carolina. Obviously very  
12 different facts, but we think the fundamental premise that  
13 105, 105(d) which we've cited in our papers, allows the Court  
14 to take action to make sure the cases run efficiently and  
15 expeditiously and to enter orders that are not inconsistent  
16 with anything else in the Code. And so the Code is silent on  
17 this point.

18 It's a strong congressional -- a strong presumption is a  
19 congressional -- strong congressional presumption is that  
20 administrative actions should have oversight. We think the  
21 Court can use 105 to vacate this appointment.

22 So that gets us I guess if the Court agrees with all  
23 that, to the question of should you vacate the appointment and  
24 we think the equities and the facts before the Court strongly  
25 suggest that yes, the Court should. Committees can serve a  
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1 useful purpose and I think a lot of what the committee's paper  
2 actually cites to is, you know, a litany of things that  
3 committees can do in a case which obviously can be important.

4       But the committee is not needed here and really the issue  
5 is do we have adequate representation of the creditor body.  
6 And this is not a case where creditors are unrepresented. We  
7 -- by my math 98% or maybe more of unsecured creditors by  
8 dollar are represented in this case and we've been in  
9 discussions with them.

10      And some of those parties are represented by multiple  
11 entities. We have unions and the retiree committee that Your  
12 Honor agreed to put in place at our request, retiree  
13 associations, the pension systems. You have bond holder  
14 trustees and paying agents, the COP holders and the swap  
15 participants, and the insurers and numerous other parties have  
16 come before this Court.

17      They're all represented by multiple law firms, some the  
18 city is paying for already. In particular the retiree  
19 committee professionals which there's millions of dollars of  
20 the -- the estate or excuse me, the city is paying for.

21           THE COURT: How much?

22           MR. ELLMAN: How much is the retiree? I -- I wish I  
23 had that number, but I can tell you the bills are substantial  
24 and many of those bills in a given month for -- for lawyers'  
25 fees in particular are in the seven figures. But I don't have

1 a total as of today, Your Honor. I certainly could get that  
2 for you.

3 The fee examiner filed his first report which probably  
4 has the numbers for the first bid of their work. But that  
5 will all be reported ultimately to the Court through that  
6 process.

7 But at this point a new committee is not needed to  
8 represent parties because they're all represented. And it's  
9 certainly not needed in our view to -- for the people on the  
10 committee -- committee members to be represented because  
11 they're all parties participating in a case, the -- the two  
12 retirement systems in -- are at every hearing through counsel,  
13 Wilmington Trust, the COPS trustee, Fgic which is one of the  
14 insurers for the COP obligations, and then the remaining  
15 member Jessie Payne, who I believe is a tort claimant  
16 represented by counsel, just filed a motion last week or so  
17 for lifting the stay to pursue an escrow fund.

18 So these are all parties that are participating. The  
19 four in particular are engaged day to day in mediation  
20 activities and have been involved in all the major aspects of  
21 the case, eligibility, and -- and various other litigation  
22 matters. You see you have a courtroom full of people today  
23 that comprise many of those folks.

24 So we don't need representation for creditors because we  
25 have substantial representation for creditors. And the burden  
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1 on the city to deal with yet another entity I think is not  
2 justified, especially being made up of parties who are  
3 already --

4 THE COURT: Well, let me just -- let me ask you. Do  
5 -- do you see any value whatsoever that a creditors' committee  
6 could -- could bring to this process?

7 MR. ELLMAN: Well, that's pretty open ended. I mean  
8 there's -- always could be some value that another party could  
9 add.

10 THE COURT: Can you articulate any?

11 MR. ELLMAN: It would be pure speculation what could  
12 happen if they could bridge the gap in some discussion. But I  
13 can't really see it here frankly, Your Honor, because it's all  
14 the same people we're talking to for the most part.

15 So could a -- could a committee? Maybe. But I don't  
16 think in this case at this time a committee has a real role.  
17 For one thing as I mentioned the plan is about to be filed and  
18 we're very far along in the process. And talking to this  
19 group of people in a mediation setting and then negotiations  
20 that are sensitive and then also adding --

21 THE COURT: Even gap bridging is a little bit tough  
22 to foresee given the committee's disavow of any intent to  
23 participate in mediation.

24 MR. ELLMAN: I'm sorry, Your Honor?

1 going to join the mediation. So how --

2 MR. ELLMAN: Well, since the committee --

3 THE COURT: -- does it serve any gap -- gap bridging  
4 role if it doesn't join in mediation?

5 MR. ELLMAN: I -- I don't know what role they would  
6 play at that point. I guess that that's a very fair  
7 statement, Your Honor.

8 The -- the problem we see too in the context of the  
9 progress we've made to date which I think is substantial and  
10 however you measure the distance, you know, there is still  
11 plenty to do and we have a long way to go, but we've come very  
12 far down that road.

13 THE COURT: Uh-huh.

14 MR. ELLMAN: There's a lot behind us.

15 THE COURT: How many days till March 1<sup>st</sup>?

16 MR. ELLMAN: Well, we'll beat March 1<sup>st</sup>, that's --  
17 that won't be difficult because we're well prepared to file  
18 our plan. But, you know, then there's the -- the process of  
19 getting the plan approved.

20 But that process is well under way. And adding another  
21 party to that mix, especially it's a little confusing to talk  
22 to a group of people we're already talking to and wearing two  
23 different hats. And there's nothing to say that a party can't  
24 be involved in the case and sit on a committee. It happens  
25 and it can be appropriate.

1        But here it just doesn't seem to serve the purpose at  
2 this juncture with these parties. So our view -- and whatever  
3 the committee does is going to cause us to spend time and  
4 effort which is going to burden the estate. I mean I don't  
5 know what they're going to do.

6        But the other aspect of what's in the papers, of course,  
7 is that the committee has made no secret of the fact that they  
8 are going to try to burden the estate with their professional  
9 fees. Which we've seen the retiree committee fees and they're  
10 very substantial. And we agreed to pay them within reason.

11        And this could be another, you know, millions of dollars  
12 of -- of funds that the city doesn't really have and it can't  
13 really afford that are diverted from other purposes. So the  
14 burden -- we would by the way say that there's no basis for --

15            THE COURT: If this committee's fees are millions of  
16 dollars, where would it come from?

17            MR. ELLMAN: We don't really have the money, it  
18 would have to come from something else, some kind of -- come  
19 from use in the city to -- you know, taxpayers are funding  
20 this, so taxpayer money that would otherwise go to city  
21 services or to some other purpose would have to be reallocated  
22 and diverted to this. There's no other easy way to deal with  
23 that.

24            THE COURT: I wondered why your brief, I think

1 1102(a)(1) only applies in Chapter 11 cases.

2 MR. ELLMAN: Why we believe that that's true?

3 THE COURT: No. Why you disavow that.

4 MR. ELLMAN: Well, we didn't disavow that.

5 THE COURT: Your brief says you're not asserting  
6 that, but I should consider it.

7 MR. ELLMAN: Well, Your Honor, what happened, I -- I  
8 can be very frank with -- with the Court. What happened was  
9 we -- we did not believe --

10 THE COURT: I asked the author of the brief.

11 MR. ELLMAN: Well, I can -- I'm standing right here,  
12 so I can -- I can -- I'm one of the authors of the brief.

13 THE COURT: Oh, all right.

14 MR. ELLMAN: We did not believe that in reading  
15 1102(a)(1) that -- and given our experience, that it denied  
16 the U.S. Trustee discretion to appoint a committee. That was  
17 our initial belief.

18 And we explained in our reply brief how you can read that  
19 section two different ways. We re-read it in light of the  
20 trustee's brief because they made some points that made us go  
21 back and read it again. And we realized you could read it --

22 THE COURT: The plain meaning argument.

23 MR. ELLMAN: The plain meaning. And the plain  
24 meaning, it might even be a more natural reading and say they  
25 have no authority whatsoever. It's kind of a -- hard to parse

1 sentence. It's not well written. No offense to the Congress,  
2 it's just not -- it's hard to -- it's a little vague.

3 So we -- we believe that's an appropriate thing for the  
4 Court to consider. We did not -- we determined not to change  
5 our argument because we hadn't argued that initially, but I do  
6 think it's a very valid point.

7 The statute, clearly it applies at least in part only in  
8 Chapter 11 in our view. And the part that immediately follows  
9 the phrase promptly after an order for relief is entered in  
10 Chapter 11, the mandatory part, it follows that immediately,  
11 it's a temporal limitation. That clearly relates to Chapter  
12 11.

13 And it makes sense because in Chapter 9 in particular,  
14 order for relief could be -- and this was pretty fast, we got  
15 an order for relief from the Court. Could have been months  
16 from now. And to say that the U.S. Trustee has to appoint  
17 committee at the end of the case doesn't make a lot of sense.  
18 So we think that clearly doesn't apply.

19 The second half is more of a toss up, a little more  
20 difficult. But I would have no problem -- I'm not disavowing  
21 that argument. It was something we hadn't argued initially.  
22 So we wanted to be cautious about -- about how we argued it.  
23 But I think that's within the Court's discretion to find that  
24 -- that plain meaning of that provision allows you to say that  
25 the U.S. Trustee has no authority whatsoever.

1       So if you'd give me one moment. I think that covers --  
2 I'd be happy to go into more detail on any of those points,  
3 but I think that covers our basic arguments.

4       I started to talk about our view that if the committee is  
5 not disbanded, or the appointment vacated, and they do hire  
6 counsel, our view is that the city is not bound to pay for  
7 that. And we've talked about that in our brief. I'm not sure  
8 it's exactly a topic that was raised by our motion, but it  
9 does go to burden and I -- I can try to parse through the  
10 committee's argument on it. It's hard for me to follow how it  
11 makes any sense.

12      It's really a matter and a function of trying to find a  
13 way to say that 330, Section 330 of the Code, although it's  
14 not a 901(a), so it's not in Chapter 9, is somehow in Chapter  
15 9. Which I -- there is case law that says that's incorrect.  
16 That's -- there is more case law on that side, but there are  
17 some cases and I agree with the committee, I think it's more  
18 wishful thinking because it's sort of -- they would like that  
19 to be true and maybe there's a logic to it, but Congress  
20 didn't adopt that logic, so I don't see how you can go through  
21 the -- if you go through five or seven provisions, to kind of  
22 say it might have kind of been intended to -- or it might make  
23 sense for it to be included, but it's not included, so it's  
24 pretty straightforward. And we don't believe that the city  
25 can be burdened with that.

1       So it's sort of a side issue, but I think it's an  
2 important one for the Court to understand. And -- and with  
3 that, I'll be happy to go through more detail into any of  
4 this, or respond after argument.

5             THE COURT: Thank you. Thank you, sir.

6             MS. GIANNIRAKIS: Good morning, Your Honor. Maria  
7 Giannirakis on behalf of Daniel McDermott, United States  
8 Trustee.

9             Your Honor, I will try to be brief and not restate what  
10 is in our motion. I believe we covered all the points we  
11 needed to cover, but I would like to cover some points that  
12 were in debtor's reply brief in -- in brief detail today.

13           We don't believe the debtor has met its burden. It's  
14 their burden to meet and we don't believe they have done so.  
15 11 -- 1102(a)(1) requires the United States Trustee in  
16 performance of his statutory duty to appoint a committee to  
17 represent the interest of creditors.

18           Section 901 incorporates 1102 in its entirety. Therefore  
19 in the performance of the U.S. Trustee's statutory duty, they  
20 are to appoint a committee in Chapter 11 standing, Chapter 9's  
21 and he did so.

22           The committee -- or I'm sorry, the city in its reply  
23 brief is arguing that reading 1102(a)(1) in different ways  
24 limits the meaning of that section and takes away the  
25 mandatory requirement of the United States to appoint

1 committees in Chapter 9 cases. And frankly, Your Honor, this  
2 is just wrong. 1102(a)(1) in no way provides limiting  
3 language. If Congress intended the language --

4 THE COURT: Well, there is limiting language. The  
5 question is whether it applies.

6 MS. GIANNIRAKIS: It does not apply in -- and it --

7 THE COURT: All right. If the limiting language in  
8 (a)(1) doesn't apply, why is it that the limiting language in  
9 (a)(3) doesn't apply?

10 MS. GIANNIRAKIS: Your Honor, 901 incorporates 1102  
11 in its entirety. And therefore under 1101(a)(1), a committee  
12 could be appointed. Congress specifically excluded, or in  
13 (a)(3) when we're talking about small business just dose not  
14 apply to --

15 THE COURT: Well, that's the question. If (a)(3)  
16 doesn't apply because it's -- it's limited by the small  
17 business language, why doesn't (a)(1) also not apply because  
18 it's limited to Chapter 11?

19 MS. GIANNIRAKIS: Your Honor, Congress specifically  
20 excluded other Code sections it did not want included and  
21 specifically excluded 1102(a)(1). For example in 1161 in  
22 railroad cases.

23 So it could have done so when it drafted -- when it --  
24 when it excluded sections from 901. I don't believe it needed  
25 to exclude the small business section because small businesses  
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1 just don't --

2 THE COURT: Well, but isn't the answer to that that  
3 by including 1102 in 901, Congress meant to include 1102(a)(2)  
4 and (4)?

5 MS. GIANNIRAKIS: No, that's not the way the U.S.  
6 Trustee reads it. The U.S. Trustee reads it --

7 THE COURT: Well --

8 MS. GIANNIRAKIS: -- the excluded part is the  
9 1102(a)(3) just -- because small business by definition does  
10 not apply here.

11 THE COURT: But Chapter 11 does?

12 MS. GIANNIRAKIS: And Chapter 9 by -- by  
13 incorporation in -- in 901. And, Your Honor, it has been the  
14 consistent practice of the United States Trustee to solicit  
15 and appoint committees in Chapter 9 and in Chapter 11.

16 THE COURT: Yeah, but that doesn't make it right,  
17 Ma'am, does it?

18 MS. GIANNIRAKIS: We believe that the way Congress  
19 wrote it, is it intends that these committees are in Chapter 9  
20 cases, Your Honor. And then therefore it's mandatory --

21 THE COURT: Is there -- is there a single case that  
22 rejects the view that 1102(a)(1) does not apply in Chapter 9  
23 cases because it's limited to Chapter 11?

24 MS. GIANNIRAKIS: I don't believe there's any case

1           THE COURT: Either way?

2           MS. GIANNIRAKIS: Either way, correct.

3           The second argument that the -- the Court makes -- I mean  
4 I'm sorry, the city makes, is that it argues that the Court  
5 has the authority to disband this committee. But there is no  
6 authority for the Court to disband.

7           Again, 11 -- 1102 gave the United States Trustee and the  
8 Court important but divergent authorities regarding  
9 committees. The Court can order the United States Trustee to  
10 appoint additional committees under 1102(a)(2), order the  
11 Court not -- or I'm sorry, order the United States Trustee not  
12 to appoint a committee in a small business case, or order the  
13 United States Trustee to change the membership of the  
14 committee.

15           The -- 1102 is silent next to the power of the Court to  
16 disband the committees. When Congress made these changes to  
17 1102 to incorporate what the Court could do if it wanted to,  
18 it could have given the Court the authority to disband, it did  
19 not do so.

20           The debtor's --

21           THE COURT: It did give the Court in Section 105,  
22 the authority to assure the efficient administration of the  
23 estate, didn't it?

24           MS. GIANNIRAKIS: It did, Your Honor, but we don't

25 believe that applies in this case because the -- the -- 1102  
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1 gives the Court specific authority with respect to committees.  
2 And we don't believe 105 can do something that's inconsistent  
3 with other sections.

4 THE COURT: So your view is that Congress intended  
5 to impose millions of dollars of obligation on the City of  
6 Detroit with no value.

7 MS. GIANNIRAKIS: Well, we don't know that there is  
8 no value. But our --

9 THE COURT: But it doesn't matter whether there's  
10 value.

11 MS. GIANNIRAKIS: Is that the --

12 THE COURT: Is that right, Ma'am?

13 MS. GIANNIRAKIS: No. The United States Trustee has  
14 -- has a statutory duty to -- to attempt to form a committee  
15 in a case and if --

16 THE COURT: I need an answer to my question.

17 MS. GIANNIRAKIS: Could you repeat your question  
18 then, Your Honor?

19 THE COURT: It's your view that Congress intended to  
20 impose potentially millions of dollars of expense on the  
21 insolvent City of Detroit, depriving it of the opportunity to  
22 hire new police officers, or buy fire trucks, or EMS vehicles,  
23 or whatever is needed to pay for a creditors' committee that  
24 has potentially no value to the bankruptcy process. Is that  
25 your view?

1 MS. GIANNIRAKIS: Our view is that the United States  
2 Trustee is statutorily obligated to attempt to form a  
3 committee --

4 THE COURT: Could I take your answer as --

5 MS. GIANNIRAKIS: I'm sorry.

6 THE COURT: -- as an answer yes to my question,  
7 Ma'am?

8 MS. GIANNIRAKIS: I was going to finish, Your Honor.  
9 And to protect the interest of thousands of creditors who are  
10 unrepresented in this case. And although the city argues that  
11 90 -- 90 to 98, I didn't catch the number, percent of the  
12 dollar amount represented on the committee, there are  
13 thousands of creditors who aren't represented on it.

14 THE COURT: Who?

15 MS. GIANNIRAKIS: There -- there are -- I think  
16 today it says that there are 100,000 creditors that aren't  
17 represented. So the committee is there to represent them.

18 THE COURT: Who is not -- who is not represented?

19 MS. GIANNIRAKIS: Well, we believe the committee as  
20 it's composed adequately represents the interests of now the  
21 creditors that are out there.

22 THE COURT: All right. For the third time, Ma'am,  
23 who is not represented?

24 MS. GIANNIRAKIS: The tort claimants. We have trade  
25 claimants. There are other lawsuit -- litigation claimants  
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1 that aren't represented.

2 THE COURT: So why didn't you move to appoint a  
3 committee for those specific constituencies?

4 MS. GIANNIRAKIS: Well, Your Honor, we believe the  
5 Unsecured Creditors' Committee does include those creditors  
6 and they are covered under -- they are represented by the  
7 creditors' committee. We didn't feel a need to appoint  
8 additional committees other than that.

9 THE COURT: So your view was that a -- a committee,  
10 all of whom are already represented in the case, will  
11 represent the interests of trade creditors?

12 MS. GIANNIRAKIS: They are fiduciaries to the  
13 general unsecured creditors.

14 THE COURT: I'm sorry, Ma'am?

15 MS. GIANNIRAKIS: They are fiduciaries to the  
16 general unsecured creditors in the case including trade  
17 creditors.

18 THE COURT: There is a question regarding your  
19 position here that your brief did not address. And that is  
20 your standing. If you argue for the plain meaning of 1102, I  
21 have to ask you what in the Bankruptcy Code gives your office  
22 the authority to be here today and to file a brief?

23 MS. GIANNIRAKIS: Well, Your Honor, 901 incorporates  
24 1102, and 1102 states the U.S. Trustee shall appoint.

1 what language in the Code gives your office the authority to  
2 be here today?

3 MS. GIANNIRAKIS: 307, that the U.S. Trustee can  
4 appear at any hearing.

5 THE COURT: Is that incorporated into Section 901?

6 MS. GIANNIRAKIS: I --

7 THE COURT: I'm sorry?

8 MS. GIANNIRAKIS: I'm not sure without looking.

9 THE COURT: It's not.

10 MS. GIANNIRAKIS: No, Your Honor. Well, but it does  
11 say that the U.S. Trustee may appear and be heard on any issue  
12 in any case under this title, but may not file a plan.

13 THE COURT: Right. But it's not incorporated into  
14 Chapter 9.

15 MS. GIANNIRAKIS: I don't believe it needs to be  
16 because it's --

17 THE COURT: So I ask my question again. What  
18 specific language in the Bankruptcy Code authorizes your  
19 office to be here today?

20 MS. GIANNIRAKIS: Going to 307, Your Honor.

21 THE COURT: Even though 307 is not incorporated into  
22 901, and it's 901 on which you rely to assert 1102.

23 MS. GIANNIRAKIS: Well, Your Honor, I believe  
24 because it says under any case in this title, and any

1 appointed the committee, we are here -- we felt it necessary  
2 to be before your Court --

3 THE COURT: Uh-huh.

4 MS. GIANNIRAKIS: Be before the Court to offer our  
5 position.

6 THE COURT: All right. Thank you.

7 MS. GIANNIRAKIS: Getting back to disbanding the  
8 committee. The Court cites one case for the authority to  
9 disband committee --

10 THE COURT: You mean the city.

11 MS. GIANNIRAKIS: Pardon?

12 THE COURT: You mean the city.

13 MS. GIANNIRAKIS: Or the city, I'm sorry. And  
14 that's Pacific Avenue. But we believe Pacific Avenue, number  
15 one, is not controlling, but also can be distinguished on many  
16 grounds.

17 First of all, it's a North Carolina case and therefore  
18 not under the UST jurisdiction. The committee was appointed  
19 by a bankruptcy administrator part of the judicial branch.  
20 The Judge appointed the trustee -- a Chapter 11 trustee in the  
21 case.

22 The bankruptcy administrator's handbook as cited in the  
23 case says that if a trustee is appointed, the committee should  
24 cease to act. And because the committee was appointed, the  
25 Court had the power to disband the committee. So although the  
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1 reasoning was under 105, and we don't believe that was  
2 appropriate reasoning, we do believe that the Court had the  
3 authority in that case to disband the committee.

4 For these reasons, Your Honor, and for the other reasons  
5 cited in our brief, we ask the Court to deny the city's  
6 motion. We don't believe they've met their burden.

7 THE COURT: Thank you.

8 MR. MILLER: Good morning, Your Honor. Brett Miller  
9 proposed counsel, co-counsel with Mr. Shapiro for the Official  
10 Committee of Unsecured Creditors.

11 I will not restate the law that the U.S. Trustee and the  
12 city went through. And I will attempt to answer some of your  
13 questions regarding what value the creditors' committee can  
14 bring to this proceeding.

15 First off, the members of the committee sought seats on  
16 the creditors' committee. Even though four of the five of  
17 them are actively involved as Mr. Ellman said in the -- the  
18 mediation and in the -- in -- moving forward their parochial  
19 interest. They thought there was value to sit on a creditors'  
20 committee. This is often the case.

21 THE COURT: What's the committee going to do?

22 MR. MILLER: I -- I think --

23 THE COURT: Given your statement that you're not  
24 going to participate in mediation, that leaves litigation.

1 the creditors' committee has not attempted and likely will not  
2 attempt to join the mediation. Since the --

3 THE COURT: Right. So what are you going to do?

4 MR. MILLER: Well, I -- I think that we may now have  
5 to rethink the comment regarding mediation because in talking  
6 to parties, anyone involved in the mediation is sworn to  
7 secrecy and there has been no communication with counsel as to  
8 what is specifically going on in -- in mediation.

9 What we know is that a plan has not been filed. We know  
10 that these parties want and think that the creditors --

11 THE COURT: But why did you tell the Court you  
12 wouldn't participate in mediation? Why even say that?

13 MR. MILLER: Your Honor, at -- at -- at some point  
14 we believed that a plan was going to be filed prior to this  
15 hearing taking place and therefore mediation may be over and  
16 it may turn to something different in terms of plan  
17 negotiations.

18 THE COURT: Mediation won't be over until every last  
19 single issue has been settled.

20 MR. MILLER: Okay. Well, Your Honor, the committee  
21 members --

22 THE COURT: Or decided by me.

23 MR. MILLER: True. The -- the -- the committee  
24 members --

1 case is on appeal.

2 MR. MILLER: It could.

3 THE COURT: So I wonder why you would say that. I  
4 mean it seems to me to -- to reflect an -- an extraordinary  
5 lack of understanding about the importance of mediation in any  
6 reorganization case, especially a Chapter 9 case.

7 MR. MILLER: We -- we don't disagree --

8 THE COURT: Among the first orders I entered was an  
9 order appointing mediation because I wanted to impress on  
10 everyone the importance of mediation. I don't get it.

11 MR. MILLER: Well --

12 THE COURT: Well, I'm glad to hear you're rethinking  
13 it, okay.

14 MR. MILLER: We -- we -- we think that they are --

15 THE COURT: Let's talk about your role in -- in  
16 litigation. Is there -- is there a single issue you foresee  
17 bringing in any context that a party to the litigation other  
18 than the committee won't already bring?

19 MR. MILLER: I think that when you synthesize the  
20 voices of five members and come up with a unified position of  
21 a creditors' committee which oftentimes goes against one  
22 member of the committee's parochial interest, you have the  
23 committee sometimes siding with the debtor, sometimes siding  
24 with the creditor in terms of the numerous disputes that are  
25 out there. And that should provide Your Honor with a -- a --

1 at least --

2 THE COURT: Can you identify a single issue in the  
3 case as we head into plan confirmation on which you expect to  
4 agree with the debtor?

5 MR. MILLER: I -- we would have to discuss the  
6 issues with the committee. We have committee members that are  
7 torn --

8 THE COURT: The answer to my question is no.

9 MR. MILLER: Right now the committee has not taken a  
10 position on any --

11 THE COURT: Look, you're going to cost the city  
12 millions of dollars. I don't mean you, I mean the committee.

13 MR. MILLER: I -- I don't know where the -- the --  
14 the debtor comes up with millions of dollars. Taking the  
15 retiree committee's fees through a month or two where they  
16 were actively involved in litigation, litigation regarding the  
17 OPEB and the eligibility issue, that's not this committee's  
18 role.

19 I've represented committees for well over 20 years and I  
20 don't foresee any chance that millions of dollars of the  
21 city's money is going to be spent. But I can --

22 THE COURT: Is this your commitment to cap your fees  
23 at \$1,000,000?

24 MR. MILLER: I'd be happy to discuss with Jones,

1           THE COURT: Yeah, so the answer to my question is  
2 no. Assume it costs millions of dollars. Where is the value?

3           MR. MILLER: I think the answer --

4           THE COURT: As I said before, every dollar they  
5 spend on you is a dollar less for a police officer.

6           MR. MILLER: Or is it a dollar less for the  
7 unsecured creditors who have volunteered to sit on the  
8 committee.

9           THE COURT: Okay. Let's talk about that. Let's  
10 talk about that. Where are you going to find in the city's  
11 operations, additional money for unsecured creditors that  
12 justifies your fee?

13           MR. MILLER: I think that's unfortunately where 330  
14 generally comes into play in a case. And I'm not going to  
15 touch the issue of whether 330 is included because it's not  
16 under 901.

17           But the issue of reasonableness does come into play in  
18 every Chapter 11, Chapter 9 case where there's a creditors'  
19 committee and you have to at the end of the case, or whether  
20 it's through the fee examiner process, prove that your fees  
21 were reasonable. If they were not reasonable and did not add  
22 value they will not be approved. This is why creditors'  
23 committees as well as debtors and other committees' fees often  
24 are not approved.

1 question. Look, when you submit your fee application for a  
2 \$1,000,000 and I ask you, did you enhance creditors'  
3 recoveries by more than a \$1,000,000. If the answer is no,  
4 you're going to say, but we tried.

5 MR. MILLER: What if the answer is that we've worked  
6 with the five members of the committee, as well as the city,  
7 as well as the other creditors to come up with a way to short  
8 circuit and get a plan that's a consensus building plan on  
9 file earlier, several months earlier than it would have  
10 otherwise taken. Then the committee will have added value and  
11 the --

12 THE COURT: But we know that's not going to happen  
13 because I set a deadline of nine days from now.

14 MR. MILLER: Well, they'll file a plan, doesn't mean  
15 it's confirmable. I mean you've had many Chapter 9 cases  
16 starting with Orange County where original plans were not  
17 confirmed.

18 THE COURT: And that's why I wondered why you  
19 disavowed mediation.

20 MR. MILLER: Your Honor, I -- I'd be happy to -- to  
21 strike that from our papers.

22 THE COURT: We're going in circles here. And -- and  
23 I -- you know, I need an articulation of where your value is.

24 MR. MILLER: I -- I think now you're clearly  
25 pointing us to mediation. But in order to be in mediation we

1 need Your Honor to add us to mediation, we need  
2 confidentiality agreements to be agreed to. The committee is  
3 happy to go through that -- go down that path.

4 We do believe there's a need for fiduciary who can be a  
5 consensus builder. Because as things stand now --

6 THE COURT: I already have a mediator that's a  
7 consensus builder. Give me something else that I can say to  
8 the city will add value to this case.

9 MR. MILLER: I -- I -- I think that the mediator is  
10 bridging the gap between the debtor and the individual  
11 creditors whereas the creditors' committee generally bridges  
12 the gap between the individual creditors to get them to  
13 believe that each of their views, each of their parochial  
14 views is not always correct. And they need to move off of  
15 that view in terms of getting the creditors all on the same  
16 page in working with the city to get a plan together.

17 THE COURT: This will be done by a committee whose  
18 members each of whom think are special and deserve better  
19 treatment than everybody else.

20 MR. MILLER: And in every creditors' committee of  
21 non-homogenous creditors, that's exactly what happens. This  
22 is not a -- a -- a new issue. This is when there's bond  
23 holders, verse is bank debt, verse is trade creditors, verse  
24 tort litigants fighting over different parts of the capital  
25 structure. You have a -- a situation here with the pension  
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1 issues as well as --

2 THE COURT: And -- and it certainly hasn't escaped  
3 your notice that -- that because of the expense of Chapter 11,  
4 part of which is the expense of creditors' committee --  
5 committees, Chapter 11 is now a much less favored mechanism  
6 for resolving business insolvency, isn't it?

7 MR. MILLER: In terms of filings being down?

8 THE COURT: Yeah.

9 MR. MILLER: Yes.

10 THE COURT: You've noticed.

11 MR. MILLER: But -- but what happens is you -- you  
12 have pre-packaged bankruptcies now --

13 THE COURT: We don't even get those anymore.

14 MR. MILLER: I -- I -- I -- filings are down, but  
15 that's part of the economy.

16 THE COURT: I'm putting this to you hard, sir.

17 MR. MILLER: You can't --

18 THE COURT: You've got to control costs. Everyone's  
19 got to add value to the case. Where is your value?

20 MR. MILLER: Our value is to work with the creditors  
21 and work with the city first to come up with a budget whether  
22 it's capping it at a \$1,000,000, or -- or some number lower or  
23 higher, that would be a discussion.

24 You know, the new U.S. Trustee regulations require,

25 although this case was filed after that budgets be approved.  
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1 That's something that we could work with the creditors'  
2 committee to come up with a budget. If the number is less  
3 than a \$1,000,000, would that make it more likely that we'll  
4 be adding value than if it's \$5,000,000, it -- it really  
5 depends that once confidentiality agreements are agreed --  
6 agreed to and the information is provided and the creditors  
7 and the counsel and the city have discussions.

8 THE COURT: Let's get back to Section 1102.

9 MR. MILLER: Uh-huh.

10 THE COURT: What's your answer to the question about  
11 why the limitation in 1102(a)(3) would apply but not the  
12 limitation in 1102(a)(1)?

13 MR. MILLER: I think that because you have orders  
14 for relief in Chapter 11 and not in Chapter 9. And you had a  
15 situation here that --

16 THE COURT: We don't have orders for relief in  
17 Chapter 9? Of course we do. I entered one. Was that  
18 improper?

19 MR. MILLER: No, I -- I meant that -- I was going to  
20 say that you have the gap between the eligibility hearing and  
21 the order for relief. If the issue is how many months went by  
22 in terms of the -- the appointment of the creditors'  
23 committee.

24 I -- I cannot answer the how or why Congress included

1 regarding the U.S. Trustee's ability for standing. Why wasn't  
2 that included? Do you take the language that in -- in this  
3 title to mean that it should be a 901 even though it's not  
4 specifically a 901?

5 I think that what the city's counsel said was absolutely  
6 correct. This is a blank slate. There is no case law on  
7 point. There is no -- the statutes are absolutely confusing.

8 What you do have is you have a Pacific Avenue case which  
9 again you think is -- is improperly decided. But I'll  
10 actually turn Pacific Avenue around. I think that if you went  
11 to the Pacific Avenue Judge and provided him with these facts,  
12 he would say there is no Chapter 11 trustee. I didn't appoint  
13 a committee, this is the U.S. Trustee's doing. This is the  
14 U.S. Trustee's appointment and there needs to be a fiduciary  
15 for all unsecured creditors.

16 And maybe he in that case appoints a committee -- keeps  
17 the committee in place because there's a need for a voice for  
18 all creditors. Mr. Ellman said that 98% in dollars is  
19 represented. Well, he didn't say how many in terms of  
20 numbers.

21 The creditor of a \$1.00 or creditor of \$1,000,000,000  
22 should be equal. They should all have an equal voice in the  
23 bankruptcy process.

24 THE COURT: Even if it costs the city millions of

25 dollars?  
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1           MR. MILLER: Again, I don't think millions of  
2 dollars is the proper --

3           THE COURT: What other professionals is the  
4 committee going to hire?

5           MR. MILLER: The committee has nothing on the agenda  
6 to hire other professionals right now.

7           THE COURT: But that's not your commitment that  
8 there won't be any others?

9           MR. MILLER: If you'd like me to take the five --  
10 the chairperson of the committee is here and four other  
11 members. We can have a discussion. We have not discussed  
12 hiring a financial advisor if that's the question.

13           THE COURT: Well, I -- it -- it doesn't do to force  
14 that on you right now --

15           MR. MILLER: We -- we --

16           THE COURT: -- and I'm not going to.

17           MR. MILLER: We can make a commitment not to hire  
18 subject to --

19           THE COURT: I don't want you to make that  
20 commitment. Because if this goes through, it may be something  
21 you want to rethink.

22           MR. MILLER: True.

23           THE COURT: Do you agree that because 1103 applies  
24 in Chapter 9, if this motion is denied your fees are subject  
25 to Court approval?

1           MR. MILLER: I think that our fees are absolutely  
2 subject to Court approval whether --

3           THE COURT: Unlike the committee -- the retirement  
4 committee fees and the city's attorney's fees.

5           MR. MILLER: Well, Your Honor, that raises a -- a  
6 completely different issue on a completely different order  
7 that's before you whether the fee examiner order would be  
8 amended, or could be amended, or should be amended to include  
9 the creditors' committee.

10          THE COURT: Right. But that's a separate issue from  
11 whether your fees are subject to Court approval.

12          MR. MILLER: Absolutely.

13          THE COURT: Anything further, sir?

14          MR. MILLER: No, Your Honor, that's all.

15          MR. ELLMAN: Jeffrey Ellman from Jones, Day on  
16 behalf of the city. Just briefly a couple things.

17          I think starting out one of the problems here is the  
18 premise that this was a committee appointed really for no  
19 reason other than the statute in the U.S. Trustee's mind said  
20 they had to do it. So I think a lot of the questions why are  
21 we doing it this way. There's no reason. There wasn't any  
22 real thought process unfortunately on how the committee was  
23 composed. It was composed of people who stood up and said  
24 I'll do it. Maybe because they thought their fees would get  
25 paid or what have you.

1       But there is no reasoning behind the appointment as far  
2 as I can tell. And I don't think there's a committee that's  
3 needed. So I think the questions obviously before the Court  
4 is did the U.S. Trustee have any authority to appoint a  
5 committee at all. Did it have to? If it didn't have to, was  
6 it permitted to. If it was permitted to, obviously the  
7 question becomes whether you should permit it to go forward.

8       On the point of fees, I just wanted to stand up also to  
9 make a couple of points I think I made partially before. But  
10 there have been a lot of discussions about the millions of  
11 dollars that might be imposed on the city, et cetera, and  
12 Court approval of fee applications.

13       The city's view is that although the committee clearly  
14 wants to try to impose those on the city, that if you look at  
15 the Code and what's actually in Chapter 9, and what's in 904,  
16 and what -- what the Court's power is, we don't think that the  
17 city can be burdened with those fees. We could agree to -- to  
18 those. But we have --

19           THE COURT: Well, even that's a separate question  
20 from whether the fees are subject to Court approval regardless  
21 of who pays them.

22           MR. ELLMAN: Right, exactly. And I also wanted to  
23 point out that even if the committee capped its fees at  
24 whatever, even if the city agreed to pay those, much of the  
25 cost of having another party in the case is not just the

1 committee's fees because when the committee does something if  
2 it --

3 THE COURT: Uh-huh.

4 MR. ELLMAN: -- engages in litigation as you've  
5 mentioned, that, you know, then my firm and other, you know,  
6 professionals get involved, maybe other -- maybe the retiree  
7 committee gets involved, we've agreed to pay their fees. It  
8 becomes a morass and very expensive even if the committee is  
9 not charging the estate or it can't.

10 So I wanted to make that -- a record of that and also  
11 that I think we had this in our papers, that we haven't agreed  
12 to pay the committee's fees. We made that clear to the U.S.  
13 Trustee at the time of appointment as well.

14 And the only other thing I would mention, there has been  
15 -- there was the notion it's a blank slate. I think that came  
16 from me, that there's a blank slate out there. And I think  
17 that's sort of true with the case law. There is a case  
18 obviously about disbanding a committee which I think is on  
19 point. It's not completely a blank slate, but there is not a  
20 lot of case law out there.

21 But I think if you look at the Code, the Code is not a  
22 blank slate, it's pretty clear. And you have to read what it  
23 says in it. We -- there's a lot of effort to read beyond it  
24 and well, this kind of fits in here.

1 the Code. It may not be perfect the way it's written, it may  
2 not be what everyone wants it to say or what think -- people  
3 think is logical or should say, but when Congress adopts 1102  
4 into -- in Chapter 9, it adopts what it says.

5 And I just don't see how we can -- that's not a blank  
6 slate, that's the -- the words on the page. So we'd encourage  
7 the Court to do that and to grant our motion. Thank you.

8 THE COURT: All right. Thank you. The Court will  
9 take this under advisement and issue a written opinion.

10 (Court Adjourned at 10:49 a.m.)

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7 We certify that the foregoing is a correct transcript from the  
8 electronic sound recording of the proceedings in the  
9 above-entitled matter.

10

11 /s/Deborah L. Kremlick, CER-4872  
Letrice Calloway

Dated: 2-22-14

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